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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1960

No. 373

LUCILLE G. HECKENDORN, *Plaintiff-Petitioner,*

KEITH C. REMEM, *Plaintiff.*

vs.

THE FIRST NATIONAL BANK OF OTTAWA, ILLINOIS, a banking corporation, as Administrator of the Estate of CARL HECKENDORN, deceased,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ANSWER OF RESPONDENT

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In the
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OCTOBER TERM, A. D. 1960

No. 378

LUCILLE G. HECKENDORN, *Plaintiff-Petitioner,*

KEITH C. ROREM, *Plaintiff,*

vs.

THE FIRST NATIONAL BANK OF OTTAWA, ILLINOIS, a banking corporation, as Administrator of the Estate of **CARL HECKENDORN,** deceased,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ANSWER OF RESPONDENT

STATEMENT

It is the contention of the First National Bank of Ottawa, Illinois, as administrator of the Estate of Carl Heckendorn, deceased, the respondent herein, that this case does not present a substantial Federal question and that the Petition for Writ of Certiorari should be denied.

Here, a wife seeks to maintain an action in tort against the Estate of her deceased husband alleging that her husband was guilty of willful and wanton misconduct resulting in an automobile collision while he was driving an automobile in which she was a passenger and which she alleges caused injuries to her. The Married Woman's Act of Illinois of 1874 provided that a married woman may in all cases sue and be sued without joining her husband with her to the same extent as if she were unmarried, Smith-Hurd, Ill. Ann. Stat., Chap. 68, par. 1. In *Brandt* v. *Keller*, 413 Ill. 503, 109 N.E. 2d 729, the Illinois Supreme Court interpreted this statute as changing the common law rule that a wife could not maintain an action in tort against her husband so that such an action could be maintained. At the next session of the Illinois Legislature in 1953, the statute was amended to provide that neither husband nor wife may sue the other for a tort to the person committed during coverture. Smith-Hurd Ill. Ann. Stat., Chap. 68, par. 1.

In the case here involved, the Illinois Supreme Court interpreted this statute as restoring the common law rule and prohibiting the maintenance of this action. We contend that the Illinois Legislature had a clear right to restore the common law rule in this regard and that there could be no possible violation of the United States Constitution in so doing.

ARGUMENT

I.

There is no substantial Federal question involved in this case.

The right of a married woman to sue her husband in Illinois as recognized in the case of *Brandt* v. *Keller*, 413 Ill. 503, 109 N.E. 2d 729, was a statutory right. It was expressly based on the Married Woman's Act and it was expressly recognized that it was contrary to the common law rule which prohibited such actions. Since the Illinois Legislature created this action by statute, it could likewise amend the statute and take the right of action away. In 12 *Am. Jur.* "Constitutional Law," Sec. 675, p. 356, the rule is stated:

> "Generally, statutes may be repealed or changed at the will of the legislature."

In *Vance* v. *Vance*, 108 U.S. 514, 2 S.Ct. 854, 27 L. Ed. 808, it was held that the abolition of existing tacit mortgages as against third persons, unless they shall be recorded within a stated reasonable time, does not deprive a minor owner of such a mortgage of her property without due process of law. In *Gross* v. *United States Mortgage Co.*, 108 U.S. 477, 2 S.Ct. 940, 27 L. Ed. 795, the court held that the withdrawing of the inhibition of the local law against the taking of mortgages within the state by a foreign corporation does not as applied to an existing mortgage deprive a purchaser of his property without due process of law where he assumed and agreed to pay the mortgage. In the case of *Templeton* v. *Linn County*, 22 Or. 313, 29 P. 795, 15 L.R.A. 730, it was held that a statute which created a right of action against a county for an

injury resulting from a defective bridge or highway does not violate a constitutional provision that every man shall have a remedy by due course of law for injury done him in person, property or reputation, although the statute was in force at the adoption of the Constitution.

The law is also well settled that the United States Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law, where this is done to obtain a permissible legislative object. In the case of *Silver* v. *Silver*, 280 U.S. 117, 50 S.Ct. 57, 74 L. Ed. 221, a Connecticut statute provided that no guest passenger of a motor vehicle should have a cause of action against the owner or operator of the motor vehicle for injury or death in case of accident unless the accident was intentional on the part of the owner or operator. The United States Supreme Court held that the taking away of this common law cause of action was a matter solely for the state legislature and did not in any way violate the United States Constitution. The United States Supreme Court states in its opinion:

> "We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object. See *Louis Pizitz Dry Goods Co.* v. *Yeldell*, 274 U.S. 112, 116, 71 L. ed. 952, 954, 51 A.L.R. 1370, 47 Sup. Ct. Rep. 509; *New York C. R. Co.* v. *White*, 243 U.S. 188, 61 L. ed. 667, L.R.A. 1917D, 1, 37 Sup. Ct. Rep. 247, 13 N.C.C.A. 943; *Munn* v. *Illinois*, 94 U.S. 113, 24 L. ed. 77; *Mountain Timber Co.* v. *Washington*, 243 U.S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N.C.C.A. 927; *Wilmington Star Min. Co.* v. *Fulton*, 205 U.S. 60, 74, 51 L. ed. 708, 716, 27 Sup. Ct. Rep. 412.
>
> The use of the automobile as an instrument of transportation is peculiarly the subject of regulation. We cannot assume that there are no evils to be corrected

or permissible social objects to be gained by the present statute. We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation. In some jurisdictions it has been judicially determined that a lower standard of care should be exacted where the carriage in any type of vehicle is gratuitous. See *Massaletti* v. *Fitzroy*, 228 Mass. 487, L.R.A. 1918C, 264, 118 N.E. 168, Ann. Cas. 1918B, 1088, 18 N.C.C.A. 630; *Marcewgwski* v. *Sanders*, 252 Mass. 65, 147 N.E. 275; *Epps* v. *Parrish*, 26 Ga. App. 309, 106 S.E. 297. Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts."

On the authority of these decisions we assert that the act of the Illinois Legislature in taking away a cause of action which was purely statutory, and which was originally created by the Illinois Legislature in derogation of the common law, did not in any way violate the United States Constitution.

II.

The Married Woman's Act of Illinois of 1874, as amended in 1953, providing that neither husband nor wife may sue the other for a tort to the person committed during coverture is valid and constitutional.

All of the authorities recognize the common law rule that one spouse cannot maintain a legal action against the other to recover for a tort against the person committed during coverture. In 27 Am. Jur. "*Husband and Wife*," Sec. 589, p. 191, the rule is set forth as follows:

> "At common law, a tort committed by one spouse against the person or character of the other does not give rise to a cause of action in favor of the injured spouse. A divorce does not change this rule so as to enable a suit to be maintained after the obtaining of an absolute divorce. Under this rule no cause of action arises in favor of either husband or wife for an assault and battery committed by one on the other or for any other personal injury inflicted by one on the other during coverture. There is, at common law, no liability on the part of one spouse for infecting the other with a venereal disease. One spouse who is forcibly taken to an insane asylum by the other cannot hold the latter liable in damages for such an act."

In *Thompson* v. *Thompson*, 218 U.S. 611, 31 S.Ct. 111, 54 L. Ed. 1180, the United States Supreme Court had before it the Married Woman's Act of the District of Columbia. It was there held that this Married Woman's Act did not change the common law rule and that a wife could not maintain an action of assault against her husband. The court recognizes the common law rule as follows:

> "At the common law the husband and wife were regarded as one, the legal existence of the wife during coverture being merged in that of the husband; and generally speaking, the wife was incapable of making contracts, of acquiring property or disposing of the same without her husband's consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other."

The court then goes on to hold that it was not the intention of Congress in passing the Married Woman's Act for the District of Columbia to change this common law rule. It would certainly be an anomaly if the United States Supreme Court were to hold that the common law is in

full force and effect in the District of Columbia, so that a married woman cannot sue her husband, but that a statute of the State of Illinois, which restores this common-law rule in Illinois violates the due process clause of the United States Constitution.

The Illinois Supreme Court has always recognized that under the common law a wife could not sue her husband in tort. In *Welch* v. *Davis*, 410 Ill. 130, 101 N.E. 2d 547, the Illinois Supreme Court had before it the question as to whether a wife's administrator could maintain an action for wrongful death against her husband. The court recognized the common law rule that a wife cannot sue her husband for tort committed during coverture. It was not decided in this case whether the common law immunity survived in all cases. The court merely held that it did not apply in a wrongful death action. The court stated:

> "Two obstacles thus combined at common law to preclude an action by a wife against her husband. First there was the somewhat metaphysical difficulty concerning the parties: the husband, enforcing the right of his wife as plaintiff, would be suing himself as defendant; and, second, any recovery on behalf of the wife would immediately become the property of her husband, so that the action would have been a circuitous futility."

In 1953 in the case of *Brandt* v. *Keller*, 413 Ill. 503, 109 N.E. 2d 729, the Illinois Supreme Court had before it for the first time the question as to whether a wife could sue her husband in tort. The court again recognized the common law rule that a wife cannot sue her husband stating:

> "At common law a married woman had no separate identity before the law; she was regarded as a chattel with neither property or other rights against anyone, for her husband owned all her property and asserted

> all her legal and equitable rights. (*Snell* v. *Snell*, 123 Ill. 403, 407 *et seq.*; *Hoder* v. *Boggs*, 63 Ill. 161.) As a consequence of this status, which was founded upon the prevailing feudal economy, the rule evolved that the husband was immune to all suits by his wife, including actions for personal injuries he might inflict upon her."

The court goes on to hold that the common law rule is abrogated by the Married Woman's Act and for that reason the suit could be maintained. Obviously it was a direct result of this decision that the legislature in 1953 amended the Married Woman's Act to prevent a husband or wife from suing the other for tort to the person committed during coverture.

In 43 *A. L. R.* 2d 632 Ann. the cases from throughout the United States are collected on this subject. All of these cases recognize the common law rule that a wife cannot maintain suit against her husband for a tort. A majority of the courts hold to this view even in the face of the Married Woman's Act passed in the state. Cases from some 35 jurisdictions denying the wife the right to bring such a suit are cited in the annotation. A minority of the jurisdictions hold that an action may be maintained. However, in all of these cases where the suit is permitted, the court arrives at this result by an interpretation of the Married Woman's Act in the particular state. All recognize the common law rule. The minority view is that the Married Woman's Act has abrogated this common law rule. The cases are collected in 43 A. L. R. 2d 632 Ann. at pp. 664 through 670. This was the view adopted in Illinois before the passing by the legislature of the statute which must be considered in this case. In *Brandt* v. *Keller*, 413 Ill. 503, 109 N.E. 2d 729, the court states:

"While the common law status of married women is merely of historical interest today, since it has been modified in varying degrees by statutes in England and in all of the States, the rule respecting the immunity of the husband to suit by his wife has persisted in many jurisdictions, particularly with reference to torts committed by him. The vitality of the rule in each jurisdiction depends upon the construction of the statutes emancipating married women."

The question, then, presents itself as to whether a cause of action which exists solely by virtue of a statute passed by the Illinois legislature may be taken away by another act of the legislature. This action was created by the legislature. It would be a strange doctrine indeed to hold that the legislature had power to create this cause of action, but once it was created it had no power to take it away.

Plaintiff argues that the statute violates the United States Constitution in denying a remedy for a wrong. In answer to this we say that the legislature is vested with a large discretion in determining the public policy, what the interests of public convenience and welfare require, and what measures are necessary to secure such interests. In *Clark* v. *Storchak*, 384 Ill. 564, 52 N.E. 2d 229, it was contended that the "Illinois Guest Statute" providing that a guest passenger in an automobile could sue the driver only for willful and wanton misconduct was unconstitutional. The cause of action for negligence was taken away. The contention was raised that this law violated the Illinois Constitution and the Constitution of the United States. The Illinois Supreme Court held the act valid stating:

"Courts and law writers have found it difficult to find the extent and boundaries of 'police power'. It certainly extends to the protection of the lives, health and property of the citizens and to the preservation of good order and public morals. Legislation under

> the police power of the State is not confined to public health, safety or morality, but may extend to matters in the interest of the public welfare or convenience. (*State* v. *Bassett*, 100 Conn. 430, 123 Atl. 842, 37 A.L.R. 131) A large discretion is necessarily vested in the legislature to determine not only what the interests of public convenience and welfare require, but what measures are necessary to secure such interest. (*Cotter* v. *Stockel*, 97 Conn. 239, 116 Atl. 240.) It is, of course, true that the statute here imposes upon the owner or operator of a motor vehicle a different degree of care toward a guest than he was required at common law to exercise toward a passenger who pays for his transportation. Such a distinction between the duty imposed in the case of the gratuitous performance of services and the performance of them for hire is to be found running through many fields of law."

The United States Supreme Court dismissed an appeal from this decision holding that there was no substantial Federal question involved. 322 U.S. 713, 64 S.Ct. 1270, 88 L. Ed. 1555.

The statute in question is a reasonable exercise of the police power and the determination of the public policy of the state. It is not a violation of the due process clause or of the equal protection clause of either State or Federal Constitutions. It does not unreasonably deprive a wife of a remedy for a wrong to her. As shown in the Annotation in 43 A. L. R. 2d, 632, most jurisdictions arrive at this result in the absence of a statute. The United States Supreme Court has so held in *Thompson* v. *Thompson*, 218 U.S. 611, 31 S.Ct. 111, 54 L. ed., 1180. If it were unconstitutional for a State to pass this law, then certainly the Supreme Court of the United States would not arrive at this same result, as to the law of the District of Columbia, in the absence of a statute.

There are many reasons to support the reasonableness of this statute. In the first place it preserves domestic peace and harmony. Many cases recognizing this reason are collected in 43 A. L. R. 2d, at p. 661. In *Corren* v. *Corren* (1950 Fla.) 47 So. 2d, 774, a wife brought suit against her husband for personal injuries resulting from the negligent operation of a car by the daughter of the parties who had been entrusted with it by the husband. The Court held that the action could not be maintained, stating that to permit such actions would result in havoc to the tranquillity of the home. Success of marriage must depend upon harmony between the spouses. To permit one to sue the other would certainly disrupt the lives of the parties and of the children.

Another reason frequently given is that to permit one spouse to sue the other would encourage litigation and would open the doors of the Courts to accusations of all sorts by one against the other. It would bring to public notice claims of assault, slander, libel and personal injuries of all kinds, real or fanciful. See *Thompson* v. *Thompson*, 218 U.S. 611, 54 L. Ed. 1180, 31 S. Ct. 111.

Many Courts point out that a spouse does have adequate remedies for a tort committed against her, other than an action against the other for personal injuries. In *Peters* v. *Peters*, 156 Cal. 32, 103 P. 219, the Court points out that one spouse who has been assaulted by the other can institute a criminal prosecution, and further, that a Court of Equity can do justice between the parties in an action for divorce or separate maintenance.

In *Abbott* v. *Abbott*, 67 Me. 304, the Court points out that a wife who has been assaulted by her husband has a remedy in the Criminal Courts. She has the privilege of habeas corpus, if unlawfully restrained and she can prosecute a suit for divorce at her husband's expense.

In *Drake* v. *Drake*, 145 Minn. 388, 177 N.W. 624, a husband brought suit in equity attempting to enjoin his wife from committing tortious acts toward him. The Court held that the action would not lie, stating that neither husband nor wife is without an appropriate remedy in such matters. The divorce courts are open to both parties and when the wrong constitutes a criminal offense one may prosecute the other, and the criminal laws will furnish an adequate protection.

In *Austin* v. *Austin*, 136 Miss. 61, 100 So. 591, a wife sought to bring an action against her husband for injuries resulting from his negligent operation of an automobile. The Court denied the relief stating that the Divorce Courts and the Criminal Courts furnish ample redress to the wife, and to a husband in a similar situation for such a wrong.

In *Gowin* v. *Gowin* (1924 Tex. Civ. App.) 264 S.W. 529, the wife brought suit against her husband for assault and contended that to deny her the relief would violate the provisions in the Texas Constitution that all Courts shall be open and every person, for injury done him on his person or reputation, shall have remedy by due course of law. The Court rejected this argument stating that the Constitution also provided for the adoption in Texas of the common law and that the rule of spousal disability was a part of such common law.

These arguments and reasons have been sufficient to convince Courts in a majority of jurisdictions of the wisdom of the common law rule in the absence of a statute. Certainly, they are adequate to justify the Illinois Legislature in passing this law. Many Courts hold that the common law rule should not be changed in the absence of express legislation. The minority rule permitting these actions by one spouse against the other is based on the

interpretation of the Married Woman's Act as changing the common law rule. It cannot be logically contended that there was any duty on the legislature to pass the Married Woman's Act of 1874. If it had not done so then clearly this action could not be maintained. Since the action is based solely on the act of the legislature, certainly the legislature can change that act and abrogate the cause of action.

III.

The Statute in question does not impair the obligation of the Marriage Contract.

Finally, the plaintiff contends that the statute is unconstitutional because it impairs the obligation of the marriage contract. It is difficult to see how taking away a tort cause of action has anything to do with the marriage contract between the parties. As a matter of fact, the very purpose of the statute is to preserve the marriage contract. One of the principal reasons for the statute is to preserve marital harmony. To permit one spouse to sue another might well lead to an irreparable breach between the parties. This would open the door of the Divorce Courts and would destroy the marriage contract. The reasonableness of this statute is supported by the authorities in 43 A. L. R. 2d 632 Ann. at p. 663 and 664. See also *Peters* v. *Peters*, 156 Cal. 32, 103 Pac. 219. *Abbott* v. *Abbott*, 67 Me. 304, *Drake* v. *Drake*, 145 Minn. 388, 177 N.W. 624, *Austin* v. *Austin*, 136 Miss. 61, 100 So. 591. The only case that we have found even raising the contention that to prevent an action by one spouse against the other, impairs the obligation of the marriage contract is *Gowan* v. *Gowan* (1924 Tex. Civ. App.) 292 S.W. 211. There the contention was dismissed as without merit. We submit that it has no merit here.

SUMMARY OF ARGUMENT

We submit that there is no substantial Federal question involved in this case. At common law a married woman has no right to sue her husband in tort. Although all states have enacted Married Women's Acts, the majority of them have interpreted these acts as not giving a wife a right to sue her husband in tort. In the minority of states that permit such an action, it is recognized as purely a statutory right of action. In Illinois the Married Woman's Act was interpreted to permit an action by a wife against her husband in tort. This was purely statutory. The Illinois Legislature amended this statute to restore the common law rule to prevent actions in tort by married women against their husbands. This was a reasonable exercise of the police power by the Illinois Legislature. It did not in any way deprive any person of due process of law or any other right guaranteed by the United States Constitution. Likewise, it did not impair any obligation of the marriage contract.

CONCLUSION

We respectfully submit that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

ANDREW J. O'CONOR

Attorney for Respondent